INDEX

	Page
I. There is No Basis for Respondent's Contention that it was Convicted of an Unfair Labor Practice with which it was not Charged	1
II. The Evidence and the Findings Show that the San Francisco Operators Ceased Work as a Consequence of and in Connection with a Current Labor Dispute and Therefore that they were Employees within the Terms of the Act	10
III. The Board's Order of Reinstatement Rests upon Respondent's Illegal Discrimination against the Five Men Ordered Reinstated, not upon the Power of the Board to Order Reinstatement of all Strikers	15
IV. Respondent is not Entitled to an Independent Judgment by the Courts on the Questions of Fact Presented	22
V. The Meaning of the Board's Order	24

CITATIONS

Cases:

Black Diamond Steamship Corp. v. *National Labor Relations Board* (C. C. A. 2d, Feb. 14, 1938)	17
Crowell v. *Benson*, 285 U. S. 22	23
Jeffery-DeWitt Insulator Co. v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 58 S. Ct. 55	17
Lauf v. *E. G. Shinner & Co., Inc.*, 58 S. Ct. 578	13
Mooresville Cotton Mills v. *National Labor Relations Board*, 94 F. (2d) 61 (C. C. A. 4th)	17
Myers v. *Bethlehem Shipbuilding Corporation*, 58 S. Ct. 459	24
National Labor Relations Board v. *Bell Oil & Gas Co.*, 91 F. (2d) 509, 93 F. (2d) 1010 (C. C. A. 5th)	17
National Labor Relations Board v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th)	17
National Labor Relations Board v. *Remington Rand, Inc.* (C. C. A. 2d, Feb. 14, 1938)	16
New Negro Alliance v. *Sanitary Grocery Co.*, decided March 28, 1938	13
Washington, Virginia & Maryland Coach Co. v. *National Labor Relations Board*, 301 U. S. 142	23

56753—38——1

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 706

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MACKAY RADIO & TELEGRAPH COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply brief is filed in order to reclarify the issues in the case, which have been confused in several important respects by arguments of respondent based upon unfounded assumptions and inaccurate interpretations of the record.

I

THERE IS NO BASIS FOR RESPONDENT'S CONTENTION THAT IT WAS CONVICTED OF AN UNFAIR LABOR PRACTICE WITH WHICH IT WAS NOT CHARGED

Respondent's contention (Point I, pp. 7–16) that "it was convicted of an unfair labor practice with

which it was not charged" is essentially a play upon words. It is utterly lacking in substance.

The contention rests upon the assertion that two distinct charges were involved in the proceedings; first, that respondent had been guilty of unlawful discrimination in "discharging" certain employees because of their union activities; and second, that respondent had been guilty of such discrimination in refusing to "reemploy" those men. The argument is that both these charges were stated in the original complaint; that the first was disclaimed at the outset of the hearing, and the case tried on the basis of the second; that the first was formally abandoned in the amended complaint; and that, the case having thus been tried upon the second charge, the Board thereafter by its order found respondent guilty of the first charge, upon which it had not been tried.

The simple answer is that there are not, and never were, two distinct charges involved in the proceedings. The single question presented is, and continuously has been, whether respondent violated Section 8 (3) of the Act in excluding certain men from jobs because of their union activity. That question arises upon a state of facts as to which there has never been the slightest misapprehension, and which were fully set forth by counsel for the Board at the outset of the hearing (R. 134–135). A strike occurred; the strike failed; and all the men but five (apart from Salisbury, who is not here involved) were permitted to return to work.

It is a matter simply of choice of words whether respondent's discriminatory conduct with respect to the five men in question be described as a "discharge of employees," a "discharge of former employees," a "refusal to reemploy employees," or as a "refusal to reinstate after a strike men who had not lost thereby for the purposes of the Act their legal status as 'employees.'" The first expression merely states in shorter form what is spelled out in the last; for under the statutory definition men on strike are employees, and an employer's refusal to reinstate (or reemploy) them may be characterized as discharging them. The Board found (R. 46) that "by refusing to reinstate to employment" five named employees, "thereby discharging said employees * * * the respondent did discriminate in regard to tenure of employment." For purposes of apprising respondent of the nature of the charge which it had to meet, the use of one of the above expressions rather than another has no importance whatsoever. All that is important is that respondent be informed of the substance of the charge against it. Any allegation that respondent was not aware of the facts of the unfair labor practices charged by the Board is without the slightest foundation.

Respondent claims that the use of one rather than another of the above expressions completely changed the theory of the Board's case. It is asserted that the theory of the amended complaint was that respondent had discriminated in

hiring persons who were not employees, that respondent was beguiled into the assumption that the Board was not claiming that the men were employees under the Act, and that accordingly respondent had not introduced evidence showing that the men involved were not employees, i. e., individuals "whose work had ceased as a consequence of, or in connection with, a current labor dispute."

The basis of the argument is the claim, contrary to the fact (R. 8), that there was no allegation in the amended complaint that the men were employees (respondent's brief, p. 10). The amended complaint[1] alleges (R. 8) that respondent "did refuse to reemploy" five named individuals, "operators *employed* by the respondent at the San Francisco office," because of their union activities, and "has at all times since said date refused to reem-

[1] The inaccuracies in respondent's argument are typified by the statement, easily verifiable, that the amended complaint "has been so *industriously* ignored by the Board's counsel at all times since the Board's decision was filed" and that "the Board's counsel, throughout their brief herein, *meticulously* ignore the amended complaint" (respondent's brief, p. 9). Point I B, pages 33–37 of the Board's brief, the only point which deals at all with the pleadings, is devoted entirely to a consideration of the amended complaint; respondent should have taken the trouble to read the Board's brief before making unfounded assertions with respect to it in an effort to give this Court an erroneous impression as to the manner in which the Board had proceeded.

ploy *these said employees*" [italics supplied].[2] The men involved are thus twice described as employees. This put respondent on notice that the Board regarded the men denied reinstatement as employees under the Act and that the Board did not rest its case, as respondent now contends, on the theory that the men were *former* employees. Nevertheless, throughout its argument, respondent refers to the amended complaint (although without ever quoting it) as if it changed this case to one involving persons *formerly* employed, and asserts that the amendment restricted the issue of fact solely to the question of wrongfully refusing to employ former employees (respondent's brief, pp. 2, 9–13). Respondent's repeated interpolation of the word "former" in purporting to summarize the allegations of the amended complaint gives a completely erroneous impression of what was in fact alleged.

---

[2] Respondent also states (brief, p. 61) that the charges filed with the Board alleged solely a refusal to "re-employ." The charge specifically stated that respondent's officials "did discriminate, interfere with, intimidate, and coerce the members of said union by refusing *to reinstate* all workers without prejudice who were then on strike * * * (R. 1). The word "re-employ" was likewise used (R. 2), indicating their synonymity. That respondent was not misled concerning the Board's position on the status of the five men is shown by the following observation of respondent's counsel while examining one of them at the hearing:

"I understood that the position taken is that he is an employee of the company, that so long as he has no other employment he considers himself that he remains an employee" (R. 385).

All that remains of respondent's assertion with respect to the amended complaint is that it does not specify that the men were employees *because* they had ceased work as a consequence of or in connection with a labor dispute. But this objection goes only to the definiteness of the complaint, a matter which could easily have been remedied if respondent had raised the question before the Board, and not to the legal theory upon which the case was based. Certainly nothing in the complaint indicated that evidence that the men were not employees was irrelevant, or precluded respondent from proving that the men had not ceased work in connection with the current labor dispute. On the contrary, the description of the men squarely raised the issue of their status.

Respondent seeks to give the impression that it was deprived of its "day in court" by not being apprised of the Board's contention that the men discriminated against were employees who had ceased work in connection with a labor dispute, and that the reason it did not make the objection before the Board, as required by Section 10 (e) of the Act, was "that it did not know or suspect until after the Board's decision had been rendered" (respondent's brief, p. 15) that the Board would act on the theory which respondent claims it finally adopted. The only basis for respondent's contention, as we have shown, is the failure of the Board to specify that the employees were persons who

had ceased work in connection with a current labor dispute. That this objection was not made before the Board only because it never occurred to respondent or its counsel that the controversy between it and its San Francisco operators was not a labor dispute is demonstrated by the fact that respondent never made the argument to the Circuit Court of Appeals until after Judge Mathews had suggested it in his opinion.[3] Respondent does not deny that the Board's *decision* raised the issue; no omission on the part of the Board can explain the failure of respondent to raise the point when the case reached the Circuit Court of Appeals. In the long list of reasons for not enforcing the Board's order which was formally presented to that court in respondent's answer to the Board's petition for enforcement (R. 54–60), there is no reference whatever to this question. It thus appears that the alleged indefiniteness of the Board's complaint was not the real reason for respondent's failure to raise the objection before the Board, and that the entire argument, now pressed so vigorously, came as an

[3] Respondent has not denied the assertion in the main brief for the Board that—

"From the record it is perfectly clear that not until after Judge Mathew's opinion was handed down did it occur to respondent that there might be in the respect in question any technical inadequacy in the complaint as amended (Br., p. 37).

afterthought to respondent's counsel after Judge Mathew's opinion.[4]

The hollowness of respondent's contention is also shown by the actual reasons which underlay the minor amendments in the complaint which figure so largely in the structure of respondent's argument. The original complaint alleged that respondent *"on October 5, 1935,* * * * did discharge" certain named persons, "operators employed by the respondent * * * and has at all times since said date refused to reemploy these said employees * * *." Since the strike commenced at midnight on October 4, or the first moment of October 5, this allegation was susceptible of the interpretation that the Board meant that respondent had in some way caused the strike and so "discharged" its employees. This, of course, was not the theory of the complaint; nor was respondent's conduct on the first day of the strike in any way in question. The conduct in question occurred at the conclusion of the strike, beginning October 7. In the amendment, in order to make clear that the issue concerned the circumstances of resumption of work at the end of the strike and not

[4] We do not, of course, question respondent's right to make arguments here not presented to the Circuit Court of Appeals; respondent's failure to make the argument on the first hearing in the court below is emphasized only because it demonstrates that the charge that respondent was misled by the claimed differences between the Board's pleading and its decision is unfounded.

of severance at the beginning, the word "discharge" was omitted and the proper dates inserted. Paragraph 4 of the amended complaint reads:

> The respondent * * * during the period approximately October 7, 1935, to October 10, 1935, inclusive, * * * did refuse to reemploy [certain named persons] * * * operators *employed* by the respondent at the San Francisco office and has at all times since said date refused to reemploy *these said employees* * * *. [Italics supplied.]

The succeeding paragraphs were similarly changed.

Respondent's argument rises to no higher dignity than that of a play on the word "discharge." The word had originally been used in connection with the events of October 5 and never with those connected with the resumption of work after the strike from October 7 to October 10. Because of the possibly misleading connotations of the word it was eliminated from the complaint. In its order the Board again used the term "discharge," but in a different connection—applying it to respondent's discriminatory refusal to reinstate persons who were employees within the statutory definition. The description of the respondent's conduct as a "discriminatory discharge" amounted to no more than a legal characterization of respondent's conduct in "refusing to reemploy these said employees"—a characterization which might at any time have been applied to that conduct without the slightest embarrassment to respondent's defense.

Certainly the use of the word "discharge" in the order was not a return to an abandoned charge.[5]

II

THE EVIDENCE AND THE FINDINGS SHOW THAT THE SAN FRANCISCO OPERATORS CEASED WORK AS A CONSEQUENCE OF AND IN CONNECTION WITH A CURRENT LABOR DISPUTE AND THEREFORE THAT THEY WERE EMPLOYEES WITHIN THE TERMS OF THE ACT

In Point II of its brief, respondent contends that the Board failed to find that the five men were employees of respondent in that they ceased work in connection with a current labor dispute [Section 2 (3)]. The substance of this contention is that the findings are so ambiguous as to be open

---

[5] Respondent argues (brief, p. 11) that the Board's order, in requiring respondent to cease and desist from discharging employees, supports its contention that the Board decided the case on the theory of discharge after trying it on the theory of refusal to hire former employees. The entire order of the Board shows that the Board decided that respondent's discriminatory conduct in refusing to give the five men their positions constituted a violation of Section 8, subdivisions (3) and (1) of the Act, regardless of whether the men were still employees or former employees. This is shown by the fact that the affirmative provisions of the Board's order referred to reinstatement of the employees to their former positions, whereas the cease and desist provisions of the Board's order referred to "discharge" of employees. (R. 47–48). Moreover, the use of the word "discharge" in the cease and desist provisions of the order is entirely appropriate regardless of whether the unfair labor practice consisted of discharge or refusal to reinstate. Clearly in cases of discrimination the Board is empowered to order a respondent to refrain from discriminating against employees in the future by discharging them for union activity.

to the inference that the strike which occurred was not a "controversy concerning terms, tenure or conditions of employment * * *" [Section 2 (9)].

In its Answer to Petition for a Writ of Certiorari respondent deemed it an "inescapable inference" from the Board's findings that "the strike in San Francisco was a sympathetic strike in aid of the strikers in New York," that is, respondent's point-to-point employees at the New York office (pp. 21–22). By a change in the inferential process, respondent now concludes that the strike, though still sympathetic, was a "sympathy strike for the marine operators," who were not employees of respondent (respondent's brief, p. 19).

Cavalierly ignoring the Board's detailed and readily intelligible findings, respondent asserts that there is no finding that the negotiations, whose collapse resulted in the strike at San Francisco, concerned the agreement presented on behalf of the point-to-point operators. There are only two agreements referred to in the Board's decision: the point-to-point agreement and the marine agreement (R. 20). The Board found that the point-to-point and marine operators resolved upon joint action *on the two agreements,* so that one could not be adopted to the exclusion of the other, "and that the Mackay officials should have until September 23 to execute *the agreements* unless the A. R. T. A. officers *negotiating such agreements* believed ne-

gotiations were proceeding in a satisfactory manner" (R. 21, italics supplied).

The English language has lost its meaning if the Board did not find, in these sentences, that the negotiations with respondent concerned the agreements A. R. T. A. was presenting on behalf of both its point-to-point and marine members. The unsatisfactory counter-offer made by respondent during the negotiations offered wage increases for point-to-point operators at specified land offices, not including San Francisco (R. 1101). There is no ambiguity, as respondent asserts.

On the basis of an assumed hiatus in the findings, respondent, by speculation, builds up a fanciful structure in purported explanation of why the strike occurred. This structure is in essence and conclusion wholly inconsistent with the Board's detailed findings in regard to the sources and issues of the conflict between respondent and its point-to-point operators at San Francisco, summarized in our main brief (pp. 29–31). There we termed respondent's contention that the strike in San Francisco was a sympathetic strike in aid of the strikers in New York "in the most exact sense frivolous" (p. 31). This characterization is equally applicable to respondent's new contention that the San Francisco operators went on strike in sympathy with the marine operators.

Were this contention true, which it patently is not, the strikers would still be "employees" within the meaning of the Act. Even were the strike

wholly a sympathetic one, the San Francisco operators would nevertheless have ceased work in connection with a "labor dispute" within the statutory definition, which expressly excludes the requirement that "the disputants stand in the proximate relations of employer and employee" (section 2 (9)). Cf. *New Negro Alliance* v. *Sanitary Grocery Co.*, decided March 28, 1938; *Lauf* v. *E. G. Shinner & Co., Inc.*, 58 S. Ct. 578.

But, as we have seen, the strike clearly involved differences between respondent and its point-to-point operators at San Francisco. Respondent's argument that the A. R. T. A. officials prematurely abandoned negotiations cannot serve to change the essential nature of the controversy and dispute which ensued. Vigorous assertions that the Board did not find that the negotiations had in fact reached a stalemate are beside the point. No charge is here involved that respondent failed to bargain collectively in violation of Section 8, subdivision 5, of the Act. The degrees of fault for the strike are not pertinent. Had respondent's operators presented demands for a wage increase and, without negotiation, gone on strike because they deemed acceptance of their demands improbable, the strike would clearly be a labor dispute. The *subject* of the dispute, and not the *justification* for it, determines its nature as a "labor dispute" both under the Act and in universal usage of the term.

Aside from its patent irrelevance to the issue whether a labor dispute was found to have occurred

and did occur, respondent's contention that the A. R. T. A. negotiators prematurely abandoned negotiations is speculation, pure and simple. It finds support in neither the Board's findings nor in the record. It purports to be based upon the Board's finding (R. 21) that the A. R. T. A. negotiators "decided that a strike was advisable in view of the unsatisfactory state of the negotiations" which, respondent contends, is not a finding that negotiations failed, but merely a finding that the employees abandoned negotiations. From this respondent infers that there was no controversy constituting a labor dispute. This inference could only be justified on the absurd assumption that the employees walked out of the negotiations without having disagreed with the employer on any of the matters under discussion and then proceeded to call a strike for no reason at all. Upon the basis of this unwarranted inference, contrary to the facts, respondent throughout its brief characterizes the action of the union representatives as walking out in the midst of peaceful negotiations without justification. Of course, the fact of the matter is that because of this unsatisfactory state of the negotiations the men struck as a means of obtaining the agreement, negotiations to that end having failed. In any event, regardless of whether the disruption of the negotiations was justified, the fact that a strike resulted therefrom demonstrates conclusively that there was a labor dispute.

III

THE BOARD'S ORDER OF REINSTATEMENT RESTS UPON RESPONDENT'S ILLEGAL DISCRIMINATION AGAINST THE FIVE MEN ORDERED REINSTATED, NOT UPON THE POWER OF THE BOARD TO ORDER REINSTATEMENT OF ALL STRIKERS

Respondent contends in Point III of its brief that the Board's order directing reinstatement of the five men involved in this case was not authorized by the Act (respondent's brief, pp. 24–40). In support of this contention respondent presents, as determinative, issues which are wholly extraneous to the present case and assigns to the Board positions on those issues which it has never taken. Thus, respondent states that unless the Board is authorized to order the reinstatement of all strikers in every case where their demand therefor is rejected, whether or not the strike was provoked or prolonged by unfair labor practices, the order in the present case cannot be sustained. Respondent then interprets the Board's position as an assertion that it has such power under the Act, that the Act "guarantees the striker his job whenever he wants it" and argues that the Act cannot stand this construction (respondent's brief, pp. 27, 39–40).

Respondent's argument rests upon a gross misstatement of the Board's position and the issues involved here. The Board has never con-

tended, in this case or any other, that an employer who has neither caused nor prolonged a strike through unfair labor practices, cannot take full advantage of economic forces working for his victory in a labor dispute. The Act clearly does not forbid him, in the absence of such unfair labor practices, to replace the striking employees with new employees or authorize an order directing that all the strikers be reinstated and the new employees discharged. Admittedly the strikers are not "guaranteed" reinstatement by the Act.

It is clear that an order of reinstatement is not authorized under the Act unless there has been an unfair labor practice. The Board's powers are in the most exact sense remedial; reinstatement cannot be directed unless the Board finds it necessary to remedy the employer's unfair labor practices. Thus, where a strike is caused by an unfair labor practice an order of reinstatement of the strikers is justified. *National Labor Relations Board* v. *Remington Rand, Inc.* (C. C. A. 2d, February 14, 1938). Similarly, where the strike is not caused by an unfair labor practice but where, during the strike, the employer commits an unfair labor practice, such as a refusal to bargain with the representatives of his employees, reinstatement is ordered only to the extent that the strikers had not been replaced at the time of the unfair labor practice. The other strikers, for whom positions are not available, are placed on a preferential list. Thus

the employer is not required to discharge any new employees hired prior to the commission of the unfair labor practice. *Black Diamond Steamship Corp.* v. *National Labor Relations Board* (C. C. A. 2d, February 14, 1938); *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 58 S. Ct. 55; *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9th).

In the present case, as in *Mooresville Cotton Mills* v. *National Labor Relations Board,* 94 F. (2d) 61 (C. C. A. 4th) and *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. (2d) 509, 93 F. (2d) 1010 (C. C. A. 5th), the Board directed the reinstatement of the particular strikers against whom the employer discriminated because of their union activities in selecting strikers for reinstatement. In these cases the exercise of the power is also remedial in every sense of the term: in each the Board found that, had the men not been discriminated against in violation of the Act, they would have been permitted to return to work.

It is far from the mark, therefore, to interpret the Board's order as "guaranteeing" their positions to strikers or restricting respondent's right to hire new employees to the exclusion of strikers. Admittedly an employer is fully within his rights under the statute in refusing to reinstate striking employees when he has legally filled their positions prior to the commission of any unfair labor prac-

tice. The Board did not question that right in this case. It did not hold a refusal to reinstate all the strikers violative of the Act. The Board found that, in *selecting* the five to be eliminated, respondent was guilty of discrimination forbidden by the statute.[6] The record shows (petitioner's main

[6] That the theory upon which the Board's decision was predicated is not that asserted by respondent is clearly shown by the Board's decision: "The respondent is therefore contending that such strikebreakers are entitled to the four positions in question in preference to the men who had held them at the time the strike had commenced and who because of union activity had temporarily severed their active work on those jobs but not their status as employees of the respondent. See Section 2, subdivision (3) of the National Labor Relations Act. It might be argued by these four operators that the granting of such a preference to the strikebreakers was a discrimination in regard to tenure of employment of the type forbidden by Section 8, subdivision (3) of the Act and that therefore their claim under the Act to the four jobs is greater than that of the strikebreakers. However, since we find that a decision on the point is not necessary to the final judgment in this case. we will not decide the matter. Instead, we assume merely for the sake of argument, that the respondent was entitled to retain these strikebreakers, and that such retention was not a discrimination within the meaning of Section 8, subdivision (3). But as a consequence of such retention it became necessary to refuse reinstatement to four of the San Francisco operators employed at the time of the strike. *In choosing the four to be in effect discharged, the respondent could not violate the provisions of Section 8, subdivision (3) and consequently a choice based upon discrimination for union membership or activity within the meaning of that subdivision would be unlawful. Thus the controlling question in this case is whether the respondent*

brief, pp. 58, 65) that in view of the superior efficiency of the men denied reinstatement, they would have been among those permitted to return to work if respondent had not discriminated against them because of their union leadership and activity.

In selecting strikers for reinstatement, the employer is not free to make his choice on the basis of union activity. He must exercise on a different basis his right to eliminate a number of the men. Had respondent done so, its failure to reinstate five of the strikers would not have been an unfair labor practice within the meaning of the Act.[7]

Respondent now concedes that it discriminated against four of the men because they were strike

---

obeyed the mandate of that subdivision in the method it adopted and the selection it made" (R. 31). [Italics supplied.]

[7] Respondent's fear that enforcement of the Board's order would compel discharge of the five strikebreakers (R. Brief, p. 78), is baseless. Respondent was at all times, and remains, free to discharge any of the strikers on any basis other than union activities. Indeed, if the order of the Board is enforced and Rone, Loudermilk, Palmer, Bash, and Phelps restored to employment, any of these five may validly be included among those to be eliminated by selection according to such non-discriminatory standards as efficiency, seniority, etc., as respondent may choose. There is no ground whatsoever for respondent's assertion that the Board's order compels it to favor the strike leaders over the rank and file members or "guarantees" the former their jobs (respondent's brief, pp. 32–33).

leaders,[8] but argues that discrimination among members of the same union on the basis of degree of union activity cannot discourage membership in the union and therefore cannot constitute an unfair labor practice within the meaning of Section 8, subdivision 3, of the Act. Respondent therefore asserts that it is free to penalize the union leaders because, in respondent's opinion, the strike was not justified.

It is apparent that discrimination against union leaders because of their leadership is one of the most drastic forms of interference with self-organization. Nor can the Board or this Court draw meaningful distinctions between good and bad leaders and condone discrimination against the latter. On this record, it cannot be said that the leadership was at fault. The employees authorized the calling of the strike and answered the strike call to a man (petitioner's main brief, p. 30). There is no evidence that they were deceived or misled. Even were they, however, the abuse would seem to be one peculiarly suited to correction by the union members and not by respondent. Dis-

[8] The following statements in respondent's brief, we submit, support the statement in our text:

"We say that the preference in re-employment which was accorded herein to the rank and file members of the union, rather than to the leaders who led them into an unprovoked and disastrous strike, did not interfere or tend to interfere with any activity protected by or sought to be facilitated by the Act. * * * After all it is only common justice that if anyone must suffer because of this uncalled for strike, it should be the leaders who caused it" (pp. 32, 33).

crimination against union leaders, good or bad, is an unmistakable object lesson whose anti-union moral cannot be lost upon the employees. The discrimination because of union activity which respondent so freely admits was that prohibited by the express terms of the Act.[9]

Respondent urges that reinstatement of the leaders would not effectuate the policies of the Act. The declared policies of the Act are to protect commerce by preventing industrial disturbances which burden and obstruct it. The form of discrimination indulged in by respondent is at least equally conducive to the burdening of commerce as are other proscribed labor practices, and its undoing is necessary to alleviate the danger (see petitioner's main brief, pp. 45–48). This very record shows how a union will rally support to a boycott and continue the resultant interference with com-

[9]As respondent points out, Phelps, alone of the five men ordered reinstated, was not a leader of the union. Since all of the operators who returned to work were union members, there might be some force, were Phelps an operator, to a contention that union membership was not the cause of the refusal to reinstate Phelps. But Phelps was not an operator. He was the manager of the Stock Exchange Branch and Rodman testified clearly and unequivocally that he did not favor an employee in such a position joining the union (R. 1050–1051). Phelps was replaced by a non-union employee who had been brought from New York as an operator during the strike, and who was made manager of the Stock Exchange Branch in preference to Phelps after the strike when Phelps was seeking reinstatement (petitioner's main brief, pp. 63–65). This discrimination against Phelps was a definite deterrent to membership in the union.

merce until those discriminated against because of their union activities are restored to employment (R. 45, 1133–1135).

IV

RESPONDENT IS NOT ENTITLED TO AN INDEPENDENT JUDGMENT BY THE COURTS ON THE QUESTIONS OF FACT PRESENTED

Respondent urges that it is entitled to the independent judgment of the courts on all questions of fact because proceedings before the Board are in the nature of private controversies. The premise is unsound, since proceedings before the Board are for the protection of the public. But even were the proceedings private in nature, as respondent asserts, we fail to see why Article III of the Constitution limits the power of Congress to establish administrative tribunals for the determination of one kind of controversy more than the other. Acceptance of any such argument would either render the National Labor Relations Act unconstitutional or change the Board into an agency, similar to a master or referee, for the taking of testimony to be submitted to the courts, contrary to the express terms of the Act (respondent's brief, p. 54).

Respondent also asserts, citing *Crowell* v. *Benson,* 285 U. S. 22, that the courts must at least exercise their independent judgment on questions of fact which are "jurisdictional" under the Constitution or the Act, and urges that the question of whether the men here involved were employees

because they ceased work in connection with a labor dispute is "jurisdictional." As appears from Point II of the Board's main brief, we do not believe it essential to the enforcement of the Board's order that the men be employees within the meaning of the Act. But assuming the contrary, a finding of fact that the men discriminated against were employees is no more a prerequisite to action by the Board than findings as to any of the other ingredients of the unfair labor practices charged. There is no more reason to hold the former "jurisdictional" than the latter.

This Court rejected a similar argument in *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 147. It was there contended [10] that since Conress could only, under the Fifth Amendment, prohibit discharges because of union activity, the question of whether a particular discharge had been made because of union activity was a constitutional fact which the courts must determine for themselves. In answer to this argument this Court said:

> This is not a case of alleged confiscation, nor is it one where the Board lacked jurisdiction, for admittedly the petitioner's activities are in interstate commerce. The complaint is merely of error in appreciating and weighing evidence. In the case of statutory provisions like § 10 (e), applicable to other administrative tribunals, we have refused to review the evidence or weigh the

[10] See petitioner's brief, No. 469, October Term 1936, p. 16.

> testimony and have declared we will reverse or modify the findings only if clearly improper or not supported by substantial evidence. The contentions respecting the rejection of evidence are not well founded.

See also *Myers* v. *Bethlehem Shipbuilding Corporation,* 58 S. Ct. 459.

V

THE MEANING OF THE BOARD'S ORDER

Respondent interprets paragraph 2 (b) of the Board's order (R. 48) as requiring it to pay back wages for the period elapsing between the date of the illegal discrimination and the time when reinstatement is offered pursuant to the order, without deduction of sums earned at other employment after the close of the hearings. It then contends that this paragraph, thus construed, is so arbitrary and capricious that the court below was warranted in denying enforcement to the entire order.

The order does not stand respondent's construction. The provision that respondent "make whole" the men clearly confines the sum that respondent is required to pay to what is necessary to do just that. Deduction of additional amounts earned after the hearing but prior to reinstatement is thus authorized. The order could have explicitly provided for such deduction, but since that is its intended and only permissible meaning, its lack of explicitness hardly evinces arbitrariness or caprice.

Respondent further claims (brief, p. 78) that the order requires it to refrain from discharging members of A. R. T. A. for any reason, placing no limitation "upon such a drastic mandate." Respondent misreads the order. Paragraph 1 (a) of the order directs respondent to cease and desist "from discharging or threatening to discharge any of its employees *for the reason that such employees have joined or assisted [the Union] or otherwise enaged in union activity*" (R. 47). Paragraph 2 (c) of the order (R. 48), requiring respondent to post notices stating that it would comply with this cease and desist provision, is necessarily limited in scope by the latter and cannot be read as respondent has read it.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

HENRY M. HART, JR.,
Attorney.

CHARLES FAHY,
General Counsel,

ROBERT B. WATTS,
Associate General Counsel.

LAURENCE A. KNAPP,
MORTIMER B. WOLF,
Attorneys,
National Labor Relations Board.

APRIL 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938